

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN M. , a minor by and  
through his natural parents :  
and next friends, K.M. and  
M.M.,  
Plaintiff

CIVIL ACTION

v.

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BRISTOL TOWNSHIP SCHOOL  
DISTRICT,

Defendant

NO. 00-6030

MEMORANDUM AND ORDER

McLaughlin, J.

January 16, 2002

The plaintiff, Kevin M., is a minor entitled to special education and related services under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487. Kevin has sued the Bucks County Intermediate Unit #22 ("BCIU") and the Bristol Township School District ("Bristol Township"), as well as individual employees of both entities. He alleges that from March of 1999 through May 10<sup>th</sup> of that year, the defendant BCIU denied him the free and appropriate public education ("FAPE") to which he was entitled by failing to respond adequately to the fact that he was teased, taunted and physically abused by his fellow students. The plaintiff alleges that the defendant Bristol Township failed to provide him with an

appropriate individualized education program ("IEP") for the 1999-2000 school year, forcing his parents to enroll him in private school.

The plaintiff is seeking money damages for the three-month period in 1999 from the BCIU, and money and other damages for the 1999-2000 school year from Bristol Township. Both defendants have moved to dismiss all of the claims against them. The Court will deny their motions in part and grant them in part.

I. Factual and Procedural History

Kevin M. suffers from central auditory processing disorder ("CAPD"), attention deficit hyperactivity disorder, inattentive type, low muscle tone and a language impairment.<sup>1</sup> He resides in Levittown, Pennsylvania, which is in the Bristol Township School District. When Kevin was in kindergarten, Bristol Township placed him in the speech and language learning support class offered through the Bucks County Intermediate Unit.

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<sup>1</sup> These background facts are taken from the complaint as supplemented by subsequent submissions. For purposes of the motions to dismiss, however, the Court will consider only those facts contained in the complaint. A complaint will be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure if, after taking all well-pleaded allegations as true and construing it in the light most favorable to the plaintiff, the Court determines that under no reasonable reading of the pleadings could the plaintiff be entitled to relief. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997).

The class was held at the Benjamin Rush Elementary School in the Bensalem School District. Kevin remained at Benjamin Rush through the fifth grade.

The parties agree that Kevin's IEP and placement for the 1998-1999 school year, his final year at Benjamin Rush, were appropriate. He alleges that he was nevertheless denied a FAPE during the months of March of 1999 through May 10<sup>th</sup> of that year, because he was teased, taunted, and physically abused by his fellow students. The argument is that this harassment distracted and upset him, preventing him from learning.

The complaint names as defendants Nancy Fromm, who was Kevin's classroom teacher during the 1998-1999 school year, Barbara Patton, Kevin's speech and language therapist during that year, and Dr. Warren Smith, the director of the BCIU. The plaintiff argues that Ms. Fromm's response when other children reported that he was being harassed was inappropriate. Ms. Fromm enforced the policy of the BCIU that any complaint of mistreatment had to come from the mistreated student him- or herself, and that it should include the names of the children involved and a description of the circumstances. When Ms. Fromm received a report from another student that Kevin was being harassed, she would ask Kevin directly if there was a problem; he always said no. The plaintiff alleges that the BCIU's anti-

tattling policy and Ms. Fromm's enforcement of it were discriminatory as applied to him, because his CAPD renders him "incapable of reconstructing and communicating past events especially when he is emotionally charged." Pl.'s Resp. to Mot. to Dismiss, Doc. 16, at 7. The plaintiff also alleges that Ms. Patton deprived him of his rights, because although she would intervene when she observed him being victimized, she did not act affirmatively to ameliorate the situation.

As the director of the BCIU, Dr. Smith was responsible for ensuring that its special education teachers and service providers were adequately trained. The plaintiff argues that it was because Ms. Fromm and Ms. Patton were not properly trained that they did not know (1) that his disability made it difficult for him to report the abuse and (2) that he needed a psychological evaluation or referral. The plaintiff also alleges that Dr. Smith violated his rights by failing to personally ensure that he was receiving the services to which he was entitled. In sum, the plaintiff contends that the way that all three of the BCIU defendants chose to approach the harassment violated his rights. They failed to provide him with compensatory strategies that would enable him to avoid hostile situations and to report any abuse himself and **they** failed to refer him for psychological services, to which he was entitled

under his IEP.

On or about May 10, 1999, the Principal of Benjamin Rush interceded and resolved the problem of other children harassing Kevin to the satisfaction of his parents. For the 1999-2000 school year, a change in placement was required, because the BCIU did not offer a speech and language program beyond the fifth grade. In February of 1999, Bristol Township proposed a change in Kevin's placement from the small class of seven or eight students with basically homogenous disabilities he was in to a **large** class of twelve to fifteen students with a variety of disabilities. Kevin's parents were concerned that the proposed placement would not meet Kevin's needs. Bristol Township met with Kevin's parents on March 3, 1999 and again on June 6th, July 1st, and September 7th of that year, but they were unable to agree on an IEP and placement for Kevin.

By May, Kevin's parents provided Bristol Township with brochures and tuition information from private schools that they believed would be appropriate for Kevin. They notified the Township that if it could not meet Kevin's needs, they would place him in private school at public expense. In August of 1999, Kevin's parents unilaterally placed Kevin in the Hill Top Preparatory School.

On June 15, 1999, Kevin's parents filed a request for a

due process hearing, alleging that the IEP proposed by Bristol Township failed to provide him with a FAPE for the 1999-2000 school year. The hearing took place over a period of nine days, from December 16, 1999 through May 18, 2000. Kevin's parents, who were seeking tuition reimbursement for the private school as well as reimbursement for their transportation costs, offered evidence that the IEP offered by Bristol Township was not appropriate and that Kevin was receiving a meaningful education benefit at the private school.

At the hearing, an issue arose as to what evidence the parents could submit regarding the appropriateness of the private school at the time the placement was made. The parents attempted to admit conference reports from Hill Top, but the hearing officer held that these were "irrelevant after the fact evidence of progress," and that they did not go to whether the placement was appropriate at the time that it was made. Mot. to Dismiss, Doc. 14, Ex. A at 39 n. 12.

In a decision issued on August 7, 2000, the hearing officer found that Bristol Township failed to provide **an** appropriate IEP for the 1999-2000 school year, because its proposed placement in a class of 25 students sharing two rooms would not meet Kevin's needs. The hearing officer found that Kevin required a classroom with less than ten students.

Despite his finding against Bristol Township with regards to the IEP, the hearing officer held that Kevin's parents were not entitled to tuition reimbursement because they failed to establish that the private school was appropriate at the time of placement. He held that the parents were entitled to reimbursement for Kevin's transportation costs to and from school, though, because reimbursement for these costs was not dependent on whether the placement was appropriate. Finally, the hearing officer held that the parents were not entitled to reimbursement for private testing that they arranged to have done.

Both sides appealed, and, on September 21, 2000, the appeals panel issued a decision upholding the hearing officer's findings regarding the IEP and reimbursement for private testing and tuition, but finding that the parents were not entitled to reimbursement for transportation. The appeals panel noted that: "It is the parents' obligation to demonstrate the appropriateness of the private placement. In many of the cases this is done by submitting the I.E.P. or educational plan in the private placement and showing how the private placement is providing the meaningful educational benefit which the district plan did not provide[.]" Mot. to Dismiss, Doc. 14, Ex. B at 2. The Appeals Panel went on to note that testimony from someone at the private

school to prove the child's progress is almost always required for parents to meet their burden.

The plaintiff subsequently brought this suit in federal court, naming as defendants the BCIU, Ms. Fromm, Ms. Patton, and Dr. Smith, Bristol Township and Bristol Township's director of special education, William J. Kent. The amended complaint alleges violations of the Fifth and Fourteenth Amendments to the United States Constitution, of Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983, of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213, and of the IDEA.

11. IDEA Claims

Both defendants contend that the plaintiff's IDEA claims against them should be dismissed.

A. Defendant Bristol Township

Defendant Bristol Township argues that the plaintiff's IDEA claim for tuition reimbursement against the Township and **Mr.** Kent should be dismissed because Kevin's parents failed to provide notice to the school district that they were unilaterally placing Kevin in private school. However, the language of the statute and regulations is permissive, providing that tuition *may*

be reduced or denied if notice is not provided. See 20 U.S.C. 1412(a)(10)(C)(iii). The Court interprets the statutory language as permitting it to balance the equities and award, reduce, or deny reimbursement taking into account all of the circumstances.

Thus, even if Kevin's parents did not provide notice, that alone would not be grounds for dismissing their claim for tuition reimbursement. In addition, the plaintiff alleges in the complaint that notice was provided. See Am. Compl. at ¶ 21. The defendants argue that the plaintiff has not produced credible evidence that notice was provided, but this is not an appropriate argument on a motion to dismiss, where the Court must accept all of the plaintiff's allegations as true.

Bristol Township also argues that the plaintiff's IDEA claim for tuition reimbursement should be dismissed because the plaintiff is barred from admitting evidence needed to support it. The Township argues that the plaintiff is barred from admitting evidence (1) because he has failed to allege procedural infirmities below and (2) because of the doctrine of claim preclusion. The Court will address these arguments in turn, without adopting the defendant's underlying assumption, namely that the evidence already in the record is insufficient to support the plaintiff's claims.

With regards to the defendants' first argument, the

statute states that the district court shall hear additional evidence at the request of a party. See 20 U.S.C. § 1415(i) (2)(B)(ii). This Court is required to consider any and all evidence that would assist it 'in ascertaining whether Congress' goal [in enacting the IDEA] has been and is being reached for the child involved." Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 760 (3d Cir. 1995). While the Court must give "due weight" to the administrative record, it has discretion to determine how much weight is due in a given case. Id. at 758. The existence of procedural infirmities below would be just one factor that the Court would weigh in deciding whether to permit the plaintiffs to admit additional evidence. In any event, the complaint does contain allegations of procedural infirmities below. The plaintiff alleges that the appeals panel denied his claim because he failed to present evidence of his progress at Hill Top, which was evidence that the hearing officer refused to admit. See Am. Compl. at ¶¶ 28 and 32.

Bristol Township also argues that the plaintiff is barred from admitting evidence to support his claim for tuition reimbursement by the doctrine of claim preclusion. However, the IDEA permits parties to appeal the decision of a special education appeals panel to the district court. See 20 U.S.C. § 1415(i) (2)(A). The plaintiff in this case is not "relitigating,"

as the defendants argue, he is appealing. The doctrine of claim preclusion is inapposite.<sup>2</sup>

The Court will dismiss the plaintiff's IDEA claim against Bristol Township for compensatory education, without prejudice, because the claim has not been exhausted.<sup>3</sup> The IDEA requires plaintiffs to exhaust their administrative remedies before proceeding with a civil action in federal court. See 20 U.S.C. § 1415(i) (2)(A) and (1). At the administrative level, the plaintiff sought tuition reimbursement as well as reimbursement for transportation costs and the costs of independent educational testing for the 1999-2000 school year. He did not seek

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<sup>2</sup> Regarding the plaintiff's non-IDEA claims, the plaintiff is not barred by claim preclusion from raising them or from presenting evidence in support of them. The IDEA provides that students and parents are required to exhaust their administrative remedies under the IDEA, but that doing so does not foreclose their ability to raise additional claims in a subsequent civil suit. 20 U.S.C. § 1415(l). The plaintiff can present evidence regarding his non-IDEA claims, since this is the first time they have been raised.

<sup>3</sup> The plaintiff argues that the exhaustion defense should not apply because the relief that he is seeking is not available under the IDEA. See Pl.'s Resp. to Mot. to Dismiss, Doc. 17, at 16 (citing W.B. v. Matula, 67 F.3d 484, 495-496 (3d Cir. 1995)). This suggests that the defendants' exhaustion argument is moot, because the plaintiff is not seeking compensatory education under the IDEA, but rather compensatory damages under Section 1983. The Court will nevertheless address the defendants' exhaustion argument, because the plaintiff has not clearly withdrawn his claim for compensatory education. See, e.g., Pl.'s Resp. to Mot. to Dismiss, Doc. 17, at 17 (concluding that this Court has the "authority to award compensatory education" despite plaintiff's failure to exhaust (emphasis added)).

compensatory education for that year.

The issues raised and the facts that need to be developed are different for tuition reimbursement than they are for compensatory education. In the case of tuition reimbursement, if the school district fails to establish that a child was provided with FAPE, the child's parents must then prove that the private placement they selected and paid for was appropriate. See Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995).

Compensatory education, on the other hand, will be awarded where the parents establish that a child is not or was not receiving an appropriate education. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 251 (3d Cir. 1999). The award of compensatory education requires the school district to provide the child with education beyond the statutory requirements, for example, past the child's twenty-first birthday, to make up for the earlier deprivation. See M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996). The "disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." M.C., 81 F.3d at 397. Because the elements of a compensatory education claim differ from the elements of a tuition reimbursement claim, the plaintiff

has not exhausted his administrative remedies with regards to the former, and he must do so before suing in federal court.

B. Defendant BCIU

The plaintiff's IDEA claims against the defendant BCIU and the three BCIU employees will also be dismissed, without prejudice, for failure to exhaust.<sup>4</sup> The first time that the plaintiff alleged that he was denied his rights under the IDEA during March, April and May of 1999 was in his amended complaint in this case. The plaintiff argues that his claim is nevertheless exhausted because, although the BCIU was not a party to the underlying due process proceeding, it was aware of the issues raised, BCIU employees conferred with counsel during the proceeding and BCIU employees testified and were subject to cross-examination. The plaintiff's arguments are unpersuasive. The 1998-1999 school year was not at issue below. Neither the parties, the hearing officer, nor the appeals panel addressed the fundamental question of whether Kevin was denied FAPE in 1999, as the plaintiff now alleges. They also did not address the many other questions raised if he were denied FAPE, such as the extent

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<sup>4</sup> As above, the Court will address the defendant's exhaustion arguments because the plaintiff has not clearly withdrawn the compensatory education claim.

of his entitlement to compensatory education and what form it should take. For these reasons, the plaintiff's IDEA claims for compensatory education against the defendant BCIU and its employees are dismissed without prejudice for failure to exhaust his administrative remedies.

111. Section 504 Claims

A. Defendant Bristol Township

The defendant Bristol Township argues that plaintiff's Section 504 claim should be dismissed because the complaint contains nothing beyond the bald assertion that all of the defendants "discriminated against plaintiff in violation *of* 29 U.S.C. § 794 and 34 C.F.R. 104.4." Am. Compl. ¶38. However, the Third Circuit has noted that: "There appear to be few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition." W.B., 67 F.3d at 492-493. The Court therefore finds that the plaintiff may pursue his tuition reimbursement claim against Bristol Township pursuant to Section 504 as well as the IDEA. To the extent that the plaintiff is seeking money damages from Bristol Township pursuant to Section 504, that claim remains as well. See id. at 494 (a plaintiff may seek money damages under Section 504, as well as via a Section 1983 claim predicated on Section 504).

B. Defendant BCIU

The plaintiff's Section 504 claim for money damages against the BCIU and its employees will also remain.<sup>5</sup> Unlike his claim for compensatory education, the plaintiff's claim for compensatory damages is not subject to the IDEA's exhaustion requirement See 20 U.S.C. § 1415(1) (exhaustion of claims under other statutes only required if "seeking relief that is also available under the [IDEA]"). Exhaustion of administrative remedies would be futile, because money damages are not available at the administrative level. See W.B., 67 F.3d at 496.

The BCIU argues that the plaintiff has failed to state a claim under Section 504 because all of the allegations in the complaint relate to the 1999-2000 school year, and the BCIU played no role in Kevin's education placement for that year. To make out a claim under Section 504, the plaintiff must allege (1) that he is disabled as defined by the act, (2) that he is "otherwise qualified" to participate in school activities, (3) that the defendants receive federal financial assistance, and (4) that the defendants discriminated against him. See 29 U.S.C. § 794; W.B., 67 F.3d at 492.

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<sup>5</sup> To the extent the plaintiff seeks compensatory education under Section 504, his claim is dismissed without prejudice pursuant to 20 U.S.C. § 1415(1).

The defendants' challenge is to the fourth prong of the test, since they argue that there are no allegations in the complaint which relate to the time period when the BCIU and its employees could conceivably have discriminated against Kevin. However, the complaint alleges that Kevin was discriminated against by the BCIU and its employees. See Am. Compl. at ¶ 38. It alleges that parents complained that Kevin was being teased, taunted and physically abused by his fellow students because of his disability, and that Ms. Fromm and Ms. Patton were informed of the harassment but refused to respond to Kevin's needs. Id. at ¶¶ 14, 15, and 16. It alleges that Dr. Smith was or should have been informed of the harassment and failed to insure that Kevin was provided with services to address it. Id. at ¶ 17. Finally, the complaint alleges that the individual defendants failed to provide Kevin with a FAPE and failed to "instruct, train, supervise and control on a continuing basis, special education teachers and/or service providers on the appropriate response to children suffering with CAPD." Id. at ¶¶ 44 and 45.

Thus, the plaintiff has alleged that the BCIU and its employees failed to address a problem which was caused by his disability, and that their failure functioned as discrimination on the basis of that disability. This is sufficient to make out a claim under Section 504, given the minimal requirements of Rule

8 of the Federal Rules of Civil Procedure.

#### IV. Section 1983 Claims

The plaintiff's Section 1983 claims are not directed at Bristol Township or the BCIU. The plaintiff has chosen to sue only the individual defendants pursuant to Section 1983. The plaintiff's Section 1983 claims against the four individual defendants are based on alleged violations of the Fifth and Fourteenth Amendments, Section 504, the ADA, and the IDEA. The plaintiff alleges that the defendants violated Section 1983 by (1) failing to implement the IDEA, failing to provide FAPE, and failing to implement an acceptable IEP, and by (2) failing to train special education teachers and/or service providers on his disability. The plaintiff alleges that all of this was done "by and through a policy, custom or practice." Am. Compl. at ¶¶ 44 and 45.

The defendant William Kent argues that plaintiff's Section 1983 claims against him in his official capacity should be dismissed (1) because certain of the underlying claims must be rejected, (2) because while the plaintiffs allege that he acted pursuant to an illegal policy, practice or custom of the school district, they do not specify what the policy, practice or custom was, and (3) because official capacity claims are duplicative of

suits against a public entity. The BCIU defendants argue that the claims against them in their official capacities should be dismissed (1) because certain of the underlying claims must be rejected, (2) because the plaintiff has failed to make out a "failure to train" claim, and (3) because the courts have not recognized a Section 1983 claim based upon Section 504 or the ADA. All of the defendants argue that the Section 1983 claims against them in their individual capacities should be dismissed as barred by qualified immunity.

A. Official Capacity Claims

In this case, the plaintiff's claims against the four individual defendants in their official capacities are not duplicative of a suit against a public entity, because the plaintiff has not sued Bristol Township or the BCIU under Section 1983. The Court finds that the plaintiff's failure to precisely delineate the challenged policy, custom or practice is also not fatal to his Section 1983 claims.<sup>6</sup> Similarly, the plaintiff's

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<sup>6</sup> In his response to the motion to dismiss, the plaintiff states that the policy at issue with regard to Mr. Kent is the school district's policy that children with disabilities entering middle school should be placed in a particular classroom because it is the "natural progression," without regard to their individual needs. Pl.'s Resp. to Mot. to Dismiss, Doc. 17, at 21. The policy with regard to the BCIU defendants is the anti-

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failure-to-train claim will not be dismissed on the grounds that he failed to "specifically identify a training program from which a deficiency could stem" or assert that the need for training was obvious. Mot. to Dismiss, Doc. 13, at 16. The complaint satisfies the liberal, notice-pleading requirements of the federal rules. The plaintiff will not be permitted to pursue his Section 1983 claims based on all of the theories of liability contained in the complaint, however.

B. Underlying Constitutional and Statutory Violations

1. Fifth Amendment Violations

The plaintiff's Section 1983 claim based on a violation of the Fifth Amendment is dismissed. The Fifth Amendment does not apply to the states. See Bartkus v. Illinois, 359 U.S. 121, 124 (1959).

2. Procedural Due Process Claims

The plaintiff's Section 1983 claims based on violations of the Fourteenth Amendment's procedural due process guarantee remain. Where, as here, the plaintiff does not challenge the statutory schemes themselves as constitutionally inadequate, a

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<sup>6</sup>(...continued)  
tattling policy described above.

procedural due process claim tracks claims brought under the IDEA and Section 504. See W.B., 67 F.3d at 502. The plaintiff's due process claim against Mr. Kent remains, then, because the plaintiff has stated claims against him for tuition reimbursement under both the IDEA and Section 504. The plaintiff's due process claims against the BCIU defendants also remain, as they track his claims against them under Section 1983 for violations of the IDEA and Section 504. The plaintiff has made out a claim against the BCIU defendants under Section 504, as explained above, and his Section 1983 claim predicated on a violation of the IDEA will also remain, as explained below.

### 3. Substantive Due Process Violations

All of the plaintiff's substantive due process claims are dismissed. The Fourteenth Amendment's substantive due process guarantee protects a limited class of liberty and property interests from executive action that can be characterized as "conscience shocking." County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998)(quoting Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992)); Nicholas v. Pa. State Univ., 227 F.3d 133, 139-140 (3d Cir. 2000).

The plaintiff's substantive due process claim against

Mr. Kent fails because education is not an interest protected by the Fourteenth Amendment, and all of the allegations against Mr. Kent relate to depriving Kevin of FAPE. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). To the extent that the plaintiff's claims against the BCIU defendants relate to a denial of FAPE, they fail as well.

To the extent that the plaintiff's claims against the BCIU defendants relate to his liberty interest in his personal bodily integrity, they fail because the Third Circuit has held that school officials do not have a constitutional obligation to intervene to protect students from being abused by their peers. See D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1378 (3d Cir. 1992). While the plaintiff argues that this case is distinguishable from D.R. because of his status as an identified disabled student, the Third Circuit noted in D.R. that the case for holding school officials responsible would be weakened in the case of disabled students, because their parents are so intimately involved in planning their education. See D.R., 972 F.2d at 1371.

#### 4. Equal Protection Violations

All of the plaintiff's Section 1983 claims based upon the Fourteenth Amendment's equal protection guarantee are also dismissed. The Equal Protection Clause requires that the law treat people who are similarly situated alike. See Plyler v. Doe, 457 U.S. 202, 216 (1982).

The complaint states that Mr. Kent was "responsible for carrying out the requirements of the IDEA and Section 504," that he intentionally failed to implement the IDEA, and that he failed to train teachers and service providers on appropriate responses to children with Kevin's disability. Am. Compl. ¶¶ 6, 44 and 45. The complaint contains just one specific allegation against Mr. Kent, that he "failed to provide procedural notice requirements." Id. at ¶ 31. In his response to the motion to dismiss, the plaintiff argues that Mr. Kent treated him differently from the other children in Mrs. Fromm's class by not informing him of his right to challenge the defendants' placement decision.

These facts, even if true, do not establish a violation of the equal protection clause, because the plaintiff has not alleged that he was denied notice based on his membership in a group with distinguishing characteristics. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366-367 (2001). The

complaint does allege that all of the defendants deprived both the plaintiff and other disabled students of their rights under the IDEA and Section 504, and the inference could be drawn from this that the plaintiff is alleging that he was treated differently based on his status as a child with disabilities. In that case, the plaintiff's equal protection claim would fail because "if special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." Id. at 368.

With regards to the BCIU defendants, the plaintiff argues that they violated the equal protection clause by enforcing an anti-tattling policy that treated him differently than all of the other children in Ms. Fromm's class, These claims fail for the same reasons that the plaintiff's claim against Mr. Kent fails.

#### 5. ADA Violations

Mr. Kent argues that the plaintiff's Section 1983 claim founded on the ADA should be dismissed, because the complaint contains no allegations in support of it. The fact that the plaintiff did not frame his allegations in terms of the ADA is not fatal to his claim, though, because an ADA claim is the

analogue of a Section 504 claim. See Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996). Like the plaintiff here, the plaintiffs in Jeremy H. did not cite a specific provision of the ADA in their complaint. The court assumed that they were relying on 42 U.S.C. § 12132, "which extends the nondiscrimination rule of [Section 504] to services provided by any 'public entity' (without regard to whether the entity is a recipient of federal funds)." Id. The Jeremy H. court noted that the ADA explicitly provides that "the remedies, procedures, and rights" under Title II of the ADA are the same as those under Section 504. See id.; 42 U.S.C. § 12133; 28 C.F.R. 35.103 (providing that the ADA is not to be construed to apply a lesser standard than the standards applied under Section 504). The plaintiff's ADA claims should remain, then, because they are the equivalent of his Section 504 claims, which remain.

The BCIU defendants argue that neither the ADA nor Section 504 may be enforced via Section 1983, because of the comprehensive remedial scheme that the two statutes share. The general rule is that Section 1983 is a "presumptively available remedy for claimed violations of federal law." Lividas v. Bradshaw, 512 U.S. 107, 133 (1994). In exceptional cases, Congress may indicate that a statutory violation will not give rise to liability under Section 1983, either expressly or by

providing for a comprehensive alternative enforcement scheme. ~~See id.~~ The burden is on the defendants to make the difficult showing that allowing a Section 1983 action to go forward would be inconsistent with the "carefully tailored scheme" set out in Section 504 and the ADA. See South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot., Nos. 01-2224 and 01-2296, 2001 WL 1602144, at \*5 (3d Cir. Dec. 17, 2001).

This case arises under Title II of the ADA, which forbids discrimination on the basis of disability on the part of public entities. See 42 U.S.C. § 12132. Title II of the ADA adopts the remedies, procedures and rights set forth in section 794a of Title 29, which contains the remedies for violations of Section 504. See 42 U.S.C. § 12133; 42 U.S.C. § 12134(b) (the regulations promulgated by the Attorney General to implement Title II shall be consistent with Section 504's coordination regulations found at 28 C.F.R. 41). Section 794a of Title 29 provides in turn that the remedies, procedures and rights set forth in Title VI of the Civil Rights Act, which forbids discrimination on the basis of race, shall be available to any person aggrieved under Section 504.<sup>7</sup> See 29 U.S.C. § 794a; 28

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<sup>7</sup> In addition to the remedies available under Title VI, Section 504's coordination regulations provides that each agency shall issue regulations to implement Section 504 with respect to  
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C.F.R. 42.530 (the procedural provisions applicable to Title VI apply to Section 504). The Third Circuit has concluded that, in the context of a disabled child's education-related case, the remedies, procedures and rights under Title VI apply to his or her ADA and Section 504 claims. See Jeremy H., 95 F.3d at 282 n.17.

The regulations implementing Title VI contain an administrative procedure for withdrawing federal funds from a recipient of such funds that engages in discrimination, but no relief is provided for wronged individuals. See 42 U.S.C. §§ 2000d-1 and 2000d-2; 28 C.F.R. 42.107 and 42.108; Freed v. Consol. Rail Corp., 201 F.3d 188, 192 (3d Cir. 2000). The Third Circuit has held that the remedial scheme set forth in Title VI and its regulations is not sufficiently comprehensive that it evidences Congress' intent to foreclose resort to Section 1983. See Powell v. Ridge, 189 F.3d 387, 402 (3d Cir. 1999) (implied overruling on other grounds recognized by South Camden Citizens in Action, 2001 WL 1602144, at \*3); see also Jeremy H., 95 F.3d at 278 n. 13 (the IDEA, which provides for a more comprehensive

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<sup>7</sup>(...continued)

the programs and activities to which it provides assistance. See 28 C.F.R. 41.4. The regulations issued by the Department of Education, the assisting agency in this case, are found at 34 C.F.R. 104.1-104.61; they do not constitute a comprehensive alternative enforcement scheme.

remedial scheme than the ADA and Section 504, does not foreclose suit under Section 1983); Frederick L. v. Dept. of Pub. Welfare, 157 F.Supp.2d 509, 533-534 (E.D. Pa. 2001). The Frederick L. court noted that the ADA provides that it is not to be construed to limit the remedies available under other laws, and that its legislative history supports a finding that "other laws" includes Section 1983. See id. For all of these reasons, this Court finds that the remedial scheme set forth in Title II of the ADA, in Section 504, and in the two statutes' regulations, is not so Comprehensive that it forecloses suit pursuant to Section 1983.

This Court notes that several of the cases cited by the defendants relate to discrimination in employment. See, e.g., Alsbrook v. City of Maumelle, 184 F.3d 999, 1011 (8<sup>th</sup> Cir. 1999) (referencing "detailed means of enforcement imported from Title VII"). These cases are inapposite, because ADA employment cases - with the exception of those brought against public entities to which Title I of the statute does not apply - are subject to an entirely different, and much more comprehensive, remedial scheme pursuant to Title VII (as opposed to Title VI) of the Civil Rights Act. See 28 C.F.R. 35.140.

6. IDEA and Section 504 Claims

The plaintiff's Section 1983 claims founded on the IDEA and Section 504 against Mr. Kent and the BCIU defendants will not be dismissed. The BCIU defendants argue that the plaintiff's Section 1983 claims based on violations of the IDEA are not exhausted, but exhaustion is not required where the suit is limited to money damages. See W.B. , 67 F.3d at 496.

The BCIU defendants also argue that the plaintiff's IDEA claims fail because all of the relevant allegations in the complaint relate to the 1999-2000 school year and are directed at Bristol Township. The IDEA provides that children with disabilities are to be afforded a free, appropriate public education which emphasizes special education and any related services which are necessary to enable the child to benefit from his or her instruction. See W.B. , 67 F.3d at 491-492. The complaint makes out an IDEA claim against the BCIU defendants because it alleges that Kevin was a disabled student entitled to special education and related services under the IDEA, that the BCIU defendants failed to respond to his disability-related needs, and that the BCIU defendants denied him a FAPE. See Am. Compl. at ¶¶ 4, 14, 15, 16, 17, and 44. The complaint also alleges that the BCIU defendants failed to train special

education teachers and service providers on the appropriate responses to children with Kevin's disability. Id. at ¶ 45.

C. Qualified Immunity Defense

The defendants argue that all *of* the the plaintiff's Section 1983 claims against William Kent and the BCIU defendants in their individual capacities should be dismissed because the defendants are protected by qualified immunity. This argument must be rejected at this stage of the litigation.

The test for whether a government official is protected by qualified immunity is (1) whether the facts, taken in the light most favorable to the plaintiff, show a violation of a clearly established right, and (2) whether, under the facts taken in the light most favorable to the plaintiff, a reasonable state actor would have understood that his actions were prohibited. Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2002). The plaintiff cannot meet the clearly-established right requirement simply by alleging the defendants violated various constitutional provisions and laws. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." See Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Third Circuit has

explained that: "A plaintiff need not show that the very action in question has previously been held unlawful, but needs to show that in light of preexisting law the unlawfulness was apparent." McLaughlin v. Watson, 271 F.3d 566, 571 (3d Cir. 2001).

The complaint in this case does not contain sufficient detail to enable the Court to determine whether or not the doctrine of qualified immunity applies. The complaint alleges that Mr. Kent "failed to implement the IDEA or provide FAPE or implement an acceptable IEP for plaintiff" and that he "failed to instruct, train, supervise and control on a continuing basis, special education teachers and/or service providers on the appropriate responses to children suffering from CAPD." Am. Compl. at ¶¶ 44 and 45. It alleges that the BCIU defendants failed to appropriately respond when Kevin was harassed. See id. at ¶¶ 15, 16 and 17.

Since the complaint is so vague about what actions Mr. Kent and the BCIU defendants took, it is impossible to tell if what they did was prohibited, and, if it was, whether a reasonable state actor would have known that it was. Qualified immunity is an affirmative defense which can only be grounds for dismissal if the defense is evident from the complaint; a plaintiff is not required to anticipate that the defense will be

raised and respond to it in the complaint. See Crawford-El v. Britton, 523 U.S. 574, 595 (1998) (citing Gomez v. Toledo, 523 U.S. 574, 639-640 (1980)).

To the extent possible, the doctrine of qualified immunity is intended to resolve insubstantial claims prior to discovery and trial. See Siegert v. Gilley, 500 U.S. 226, 231-233 (1991); Anderson, 483 U.S. at 646 n. 6; Hunter v. Brvant, 502 U.S. 224, 228 (1991); Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982). To this end, the Court will entertain a request from the defendants for, for example, relatively narrow discovery with a short time frame going only to the issue of qualified immunity for the purpose of preparing an early summary judgment motion.

#### V. State Law Claims

Finally, to the extent that the plaintiff is raising state law claims, they must be dismissed as to both defendants, for failure to specify what they are. The plaintiff alleges only that the Court has jurisdiction over their state law claims under 28 U.S.C. § 1367. See Am. Compl. at ¶ 2. The complaint contains no further description of the claims.

For all of the above reasons, the defendants' motions to dismiss are denied in part and granted in part.

An Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN M., a minor by and  
through his natural parents :  
and next friends, K.M. and  
M.M.,

Plaintiff

CIVIL ACTION

v.

BRISTOL TOWNSHIP SCHOOL  
DISTRICT,

Defendant

NO. 00-6030

AND NOW, this 16<sup>th</sup> day of January, 2002, upon consideration of defendant Bucks County Intermediate Unit #22's motion to dismiss (Document #13) and of Bristol Township School District's motion to dismiss (Document #14), as well as all responses and replies thereto, it is hereby **ORDERED** and **DECREED** that the defendants' motions are **DENIED** in part and **GRANTED** in part as follows, for the reasons stated in a memorandum of today's date:

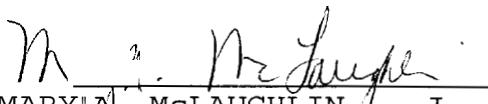
1. The plaintiff's IDEA claims for tuition reimbursement against defendants Bristol Township School District and William J. Kent are not dismissed.
2. The plaintiff's IDEA claims for compensatory education against defendants Bristol Township School District and William J. Kent are dismissed without prejudice.
3. The plaintiff's IDEA claims against defendants Bucks County Intermediate Unit, Nancy Fromm, Barbara Patton

and Warren Smith are dismissed without prejudice.

4. The plaintiff's Section 504 claims for compensatory education against Bristol Township School District and William J. Kent are dismissed without prejudice.
5. The plaintiff's Section 504 claims for tuition reimbursement and for money damages against Bristol Township School District and William J. Kent are not dismissed.
6. The plaintiff's Section 504 claims for compensatory education against Bucks County Intermediate Unit, Nancy Fromm, Barbara Patton and Warren Smith are dismissed without prejudice.
7. The plaintiff's Section 504 claims for money damages against Bucks County Intermediate Unit, Nancy Fromm, Barbara Patton and Warren Smith are not dismissed.
8. The plaintiff's Section 1983 claims against William J. Kent, Nancy Fromm, Barbara Patton and Warren Smith in their official and individual capacities for violations of the Fifth Amendment are dismissed.
9. The plaintiff's Section 1983 claims against William J. Kent, Nancy Fromm, Barbara Patton and Warren Smith in their official and individual capacities for violations of the Fourteenth Amendment procedural due process guarantee are not dismissed.

10. The plaintiff's Section 1983 claims against William J. Kent, Nancy Fromm, Barbara Patton and Warren Smith in their official and individual capacities for violations of the Fourteenth Amendment's substantive due process and equal protection guarantees are dismissed.
11. The plaintiff's Section 1983 claims against William J. Kent, Nancy Fromm, Barbara Patton and Warren Smith in their official and individual capacities for violations of the ADA, the IDEA and Section 504 are not dismissed.
12. All of the plaintiff's state **law** claims are dismissed.

BY THE COURT:

  
MARY A. McLAUGHLIN, J.